

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-7247

ORIGINAL

United States Court of Appeals

FOR THE SECOND CIRCUIT

RUTH ANN REED, as Administratrix of the Estate of
DAN WILLIAM REED, deceased, and as parent, natural
guardian, and best friend of CYNTHIA ANN REED,
DEBORA LYNN REED and JULIE MARIE REED,
all infants *et al.*,

Plaintiffs-Appellees,

v.

FORWOOD CLOUD WISER, JR., and
RICHARD E. NEUMAN,

Defendants-Appellants.

On Appeal from the United States District Court for the
Southern District of New York

APPELLEES' BRIEF

KREINDLER & KREINDLER
Attorneys for Plaintiffs-Appellees
Office and P.O. Address
99 Park Avenue
New York, New York 10016
(212) 687-8181

of Counsel:

LEE S. KREINDLER
MILTON G. SINCOFF
STANLEY J. LEVY
MELVIN I. FRIEDMAN
JAMES D. VEACH

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	1
FACTS	2
PRIOR PROCEEDINGS	3
 ARGUMENT:	
<i>Point I</i> —Under the common law, a negligent employee or agent is personally liable, independent of the employer or principal, for the damage he causes	3
<i>Point II</i> —The Warsaw Convention Treaty limits the liability of the carrier, but not its employees	6
A. Since common law rights of passengers are derogated by the Warsaw Treaty, it should be strictly construed and not applied beyond the scope justified by its language and history	6
B. The history of the Warsaw Convention shows it applies to carriers and not their employees	9
C. The Warsaw Treaty's language shows it applies to limit the liability of carriers only, not their employees	14
D. Events subsequent to Warsaw, including the unsuccessful attempt to extend Warsaw to airline employees in the Hague protocol, show Warsaw is limited to "carriers"	19
E. Cases and authoritative writers establish that Warsaw limits the damages of the carrier, but not its employees	26

	PAGE
<i>Point III</i> —Other arguments advanced by appellants for reversal lack merit	33
CONCLUSION	38

Cases Cited

<i>Alexandre v. Eastern Airlines, Inc.</i> , 9 Avi. 17,844 (W.D.N.Y. 1965)	25
<i>A. M. Collins and Co. v. Panama R. Co.</i> , 197 F.2d 893 (5th Cir. 1952)	30, 31
<i>Bauers v. Heisel</i> , 361 F.2d 581 (3d Cir. 1966) (en banc), cert. denied, 386 U.S. 1021 (1967).....	8
<i>Block v. Compagnie Nationale Air France</i> , 386 F.2d 323 (5th Cir. 1967), cert. denied, 392 U.S. 905 (1968)	20
<i>Brady v. Roosevelt, S.S. Co.</i> , 317 U.S. 575 (1943).....	3
<i>Campbell v. Matteucci</i> , 261 F.2d 225 (10th Cir. 1968)	32
<i>Chutter v. KLM</i> , 132 F.Supp. 611 (S.D.N.Y. 1955).....	30, 31
<i>Day v. Trans World Airlines, Inc.</i> , 528 F.2d 31 (2d Cir. 1975)	20
<i>Friday v. United States</i> , 239 F.2d 701 (9th Cir. 1957)	4
<i>Froman v. Pan American Airways, Inc.</i> , 1953 U.S. & Can. Avi. 1 (N.Y. Sup. Ct. 1953).....	31
<i>Herd & Co. v. Krawill Machinery Corp.</i> , 359 U.S. 297 (1959).....	8, 27, 30, 31
<i>Hoffman v. British Overseas Airways Corp.</i> , 9 Avi. 17,180 (N.Y. Sup. Ct. 1964).....	28
<i>Husserl v. Swiss Air Transport Company, Ltd.</i> , 388 F.Supp. 1238 (S.D.N.Y. 1975).....	34

TABLE OF CONTENTS

iii

	PAGE
<i>Kilberg v. Northeast Airlines</i> , 9 N.Y.2d 34, 211 N.Y.S. 2d 133 (1961).....	36
<i>Larson v. Domestic & Foreign Commerce Corp.</i> , 337 U.S. 682 (1949).....	4
<i>Lisi v. Alitalia Linee Aeree Italiane, S.p.A.</i> , 370 F. 2d 508 (2d Cir. 1966), <i>aff'd by a divided court</i> , 309 U.S. 455 (1968).....	9
<i>Maximov v. United States</i> , 373 U.S. 49 (1963).....	33
<i>Mertens v. Flying Tiger Line, Inc.</i> , 341 F.2d 851 (2d Cir. 1965), <i>cert. denied</i> , 382 U.S. 816 (1965).....	9, 20
<i>Mississippi Baptist Hospital v. Moore</i> , 156 Miss. 676, 126 So. 465 (1930).....	4
<i>New York Central Ry. Co. v. Lockwood</i> , 84 U.S. (17 Wall.) 357 (1873).....	35
<i>Pierre v. Eastern Airlines, Inc.</i> , 152 F. Supp. 486 (D.N.J. 1957)	26, 27
<i>Quinn v. Southgate Nelson Corp.</i> , 121 F.2d 190 (2d Cir. 1941)	4
<i>Rocca v. Thomson</i> , 223 U.S. 317 (1912).....	7, 26
<i>Rosenthal v. Warren</i> , 475 F.2d 438 (2d Cir. 1973), <i>cert. denied</i> , 414 U.S. 856 (1973).....	36
<i>Rosman v. Trans World Airlines, Inc.</i> , 34 N.Y.2d 385 (1974).....	34
<i>Scarf v. Trans World Airlines, Inc. and Allied Aviation Service Corp.</i> , 4 Avi. 17,795 (S.D.N.Y. 1955)..	28
<i>Scarf v. Trans World Airlines, Inc.</i> , 4 Avi. 17,828 (S.D.N.Y. 1955)	28
<i>Schloss v. Matteucci</i> , 260 F.2d 16 (10th Cir. 1961).....	32
<i>Shaw v. Railroad Co.</i> , 101 U.S. 557 (1879).....	8

	PAGE
<i>Stratton v. Trans Canada Airlines</i> , 27 D.L.R.2d 670 (B.C. Sup. Ct. 1961), <i>aff'd on other grounds</i> , 32 D.L.R.2d 736 (B.C. Ct. App. 1962).....	27
<i>Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.</i> , 204 U.S. 426 (1907)	8
<i>The Amiable Isabella</i> , 19 U.S. (6 Wheat.) 1 (1821) ..7, 25, 33	
<i>United States v. Atlantic Mutual Insurance Co.</i> , 343 U.S. 236 (1952).....	35
<i>United States v. The South Star</i> , 210 F.2d 44 (2d Cir. 1954)	30
<i>Wanderer v. Sabena</i> , 1949 U.S. Avi. Rep. 25 (N.Y. Sup. Ct. 1949).....	30

Treaty

Warsaw Convention	<i>passim</i>
-------------------------	---------------

New York Constitution

Art., §16	36
-----------------	----

Statutes

French Civil Code of 1804 (The Code Napoleon)	11
German Civil Code of 1900:	
Art. 823	12
Art. 831	12
Italian Civil Code, Art. 2043	12
The Carriage of Goods by Sea Act, 46 U.S.C. §1300 <i>et seq.</i>	8, 30

TABLE OF CONTENTS

v

	PAGE
28 U.S.C. §2679	4
38 U.S.C. §4119	4
42 U.S.C. §233	4

Other Authorities

Amos & Walton, INTRODUCTION TO FRENCH LAW (3d Ed. 1967)	19
Calkins, <i>Grand Canyon, Warsaw and the Hague Protocol</i> , 23 J. Air Law and Comm. 253 (1956)	23, 30
Civil Aeronautic's Board's Order of January 3, 1974 (Docket No. 26274), Fed. Reg. Vol. 39, No. 7, January 10, 1974	16
19 C.J.S. Corporations, §845	4
78 Cong. Rec. 11,582 (1934)	36
111 Cong. Rec. 17,882 (1965)	36
Drion, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW (1954)	32, 33
Guadalajara Convention, 500 U.N.T.S. 31	24
Guatemala City Protocol	24, 37
Hague Minutes, ICAO Doc. No. 7686-LC/140	21, 22
Ide, <i>The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.)</i> , 3 J. Air Law and Comm. 27 (1932)	9, 11

	PAGE
International Conference on Private Air Law, Guadalajara, ICAO Doc. 8301-LC/149-1 (1961), Minutes..	23, 24
JAYSON, HANDLING FEDERAL TORT CLAIMS (1974)	5
Lowenfeld & Mendelsohn, <i>The United States and the Warsaw Convention</i> , 80 Harv.L.Rev. 497 (1967).....	3, 24, 36, 37
M. Kamminga, THE AIRCRAFT COMMANDER IN COMMERCIAL AIR TRANSPORTATION (1953)	29
Montreal Agreement, Order No. E-23680 of May 13, 1966 (Docket No. 17325), Fed. Reg. Doc. 66-5494, May 18, 1966	16
Pratt, <i>Carriage by Air Act, 1952—Limitation of Air Carrier's Liability—Whether Servants of Carrier Also Protected</i> , 41 Can. B. Rev. 124 (1963)	29
PROSSER, LAW OF TORTS §93 (4th ed. 1971)	4
Report on Revision of the Warsaw Convention, Documents of the International Conference on Private Air Law, 2 ICAO Doc. No. 1686-LC/140	21
Restatement of Agency, Second, §343 (1957)	4
RIESE, LUFTRECHT (1949)	29
Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, 310 U.N.T.S. 181	24
SHEARMAN & REDFIELD, LAW OF NEGLIGENCE (1941) [1970 supp.]	4

	PAGE
U.S. Avi. Rep. 239-44 (1934).....	13, 14, 36
Von Mehren, THE CIVIL LAW SYSTEM (1957)	11, 12, 19
Warsaw Minutes, Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw (R. Horner & D. Legrez English transla- tion 1957)	10, 13

United States Court of Appeals

FOR THE SECOND CIRCUIT

RUTH ANN REED, as Administratrix of the Estate of
DAN WILLIAM REED, deceased, and as parent, natural
guardian, and best friend of CYNTHIA ANN REED,
DEBORA LYNN REED and JULIE MARIE REED,
all infants *et al.*,

Plaintiffs-Appellees,

v.

FORWOOD CLOUD WISER, JR., and
RICHARD E. NEUMAN,

Defendants-Appellants.

On Appeal from the United States District Court for the
Southern District of New York

APPELLEES' BRIEF

Question Presented

Should the Warsaw Convention Treaty's limitation of damages recoverable from the carrier be judicially extended to employees after several vain attempts to amend the Treaty to achieve such extension?

Facts

This action arises from the crash of a Trans World Airlines (hereafter TWA) Boeing 707 aircraft in the Ionian Sea approximately 100 miles west of Aroxo, Greece on September 8, 1974 (A7, 19).^{*} The aircraft, began its flight in Tel Aviv, Israel, then took off from Athens, Greece and was bound for New York City (A7, 19). All 79 passengers and 9 crewmembers aboard perished in the crash (A8, 19).

Plaintiffs-appellees are the personal representatives and next-of-kin of 9 of the passengers. Defendants-appellants at and prior to the crash were TWA's President-Chief Operating Officer and Staff Vice-President Audit and Security (A7, 18, 19).

The complaint alleged that the detonation of an explosive device caused the fatal crash, that defendants were responsible for the institution, operation and maintenance of a security system sufficient to prevent explosive devices from being aboard the aircraft, and the defendants' negligence in those responsibilities was a proximate cause of the deaths (A7, 8). The widows, children and next-of-kin of the decedent passengers were also alleged to be entitled to their compensatory damages (A8-16).

In their Answer, appellants asserted as an affirmative defense that the provisions of the Warsaw Convention and

^{*} References to "A" followed by a number are to the pages of the Joint Appendix.

the Montreal Agreement limited their liability for damages to a maximum of \$75,000 per passenger (A28 ¶ 45).*

Prior Proceedings

Plaintiffs moved to strike the affirmative defense or, alternatively, for partial summary judgment. The Honorable Marvin E. Frankel, U.S.D.J., granted the motion to strike by an opinion reported at 414 F.Supp. 863 (A285-300) and thereafter certified the question for an interlocutory appeal under 28 U.S.C. § 1292(b) (A301). This Court granted leave to appeal (A302).

ARGUMENT

POINT I

Under the common law, a negligent employee or agent is personally liable, independent of the employer or principal, for the damage he causes.

It is an axiomatic common law principle that an employee or agent is personally liable for damages caused by his negligence. Such liability is independent of the liability of the employer or principal. Thus, at common law, the defendants-appellants would be liable for their negligence in contributing to the deaths of the decedents.

The United States Supreme Court in *Brady v. Roosevelt, S.S. Co.*, 317 U.S. 575, 580 (1943) stated:

* The Warsaw damage limitation of \$8,300 was subsequently increased by many carriers to \$75,000 under threat of United States withdrawal from Warsaw. Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv.L.Rev. 497, 586-96 (1967).

"The liability of an agent for his own negligence has long been imbedded in the law. . . . [T]he principle is an ancient one. . . ."

This common law principle is articulated by authoritative treatises. Prosser, *LAW OF TORTS*, § 93 (4th ed. 1971); Shearman & Redfield, *LAW OF NEGLIGENCE*, § 262 (1941) [1970 supp.]; 19 C.J.S. *Corporations*, § 845 (1940). See also Restatement of Agency, Second § 343 (1957).

Liability for negligently caused damage is not avoided by reason of the tortfeasor acting for another as agent or employee. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 694 (1949); *Quinn v. Southgate Nelson Corp.*, 121 F.2d 190 (2d Cir. 1941); *Friday v. United States*, 239 F.2d 701 (9th Cir. 1957).

The liability of a negligent employee at common law is emphasized by imposing liability on him even though his employer is not liable.* For example, at a time when charitable corporations were immune from tort liability, the negligent employee was liable. *Mississippi Baptist Hospital v. Moore*, 156 Miss. 676, 126 So. 463, 468 (1930).

The separate and independent liability of employees from that of employers is further illustrated by the necessity for amending the Federal Torts Claims Act to eliminate distinctions between the liability of the government and a government driver (28 U.S.C. § 2679) or medical personnel employed by the Veterans' Administration (38 U.S.C. § 4116) or the Public Health Service (42 U.S.C. § 233). Absent such specific statutory provisions, a federal employee could be liable even though the government was not liable:

* This rule was also recognized in some civil law countries. See page 12 *infra*.

"Under settled legal principles, of course, the employee—since he is the actual wrongdoer—is the one who is primarily answerable in tort. The Government's liability, under the Tort Claims Act, which is based on the doctrine of *respondet superior*, is derivative and only a secondary one. Assuming, therefore, an independent basis of federal jurisdiction over the employee, the claimant should be able, in theory, to recover a judgment against the wrongdoing employee whenever he would be able to obtain a judgment against the United States. Indeed, the employee's liability may be more extensive than that of the United States for even when a judgment may not be obtainable against the United States, one might be obtainable against the employee—for example, when the evidence establishes that the claim is not within the Act's coverage as where it develops that the employee was not acting within the scope of his employment, or that the claim is one which is excluded by the Act's exception Section 2680." Jayson, *HANDLING FEDERAL TORT CLAIMS*, §178.02, p. 6-62 (1974).

It is thus evident that the common law imposes liability on the appellants, and their liability is not coextensive with or identical to their employer's (carrier's) liability. Similarly, as the following point demonstrates, the Warsaw Convention does not alter or derogate appellants' common law liability.

POINT II

The Warsaw Convention Treaty limits the liability of the carrier, but not its employees.

The language and history of the Warsaw Convention Treaty, as well as judicial precedent and other authorities, demonstrate applicability of the Treaty to TWA, but not to the appellants. The liability of the appellants is, therefore, governed by common law, not the Treaty.

The Hague Protocol Treaty amended Warsaw to render it applicable to employees of carriers, but the United States rejected the Hague Treaty; therefore, Warsaw remains effective in its original, unamended form. Hague's aborted attempt to extend Warsaw to employees corroborates Warsaw's inapplicability to the appellants.

A. Since common law rights of passengers are derogated by the Warsaw Treaty, it should be strictly construed and not applied beyond the scope justified by its language and history.

Absent the Warsaw Treaty, the plaintiffs would be entitled to recover their actual damages, without arbitrary limit, from TWA caused by its negligence. Warsaw is in clear derogation of the plaintiffs' rights against TWA. The issue here presented is whether the Treaty should be extended to the appellants, employees of TWA, in further derogation of the plaintiffs' common law rights. A principle of construction is relevant: laws created by statute or treaty in derogation of common law rights must be strictly construed and not applied beyond that justified by the language and history of the law.

Over 150 years ago, the United States Supreme Court, by Mr. Justice Story, presented a classic holding which

declined to broadly construe a treaty and refused to extend it to a situation omitted by the treaty. *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1 (1821).

"In the first place, this Court does not possess any treaty-making power. That power belongs by the constitution to another department of the government; and *to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty.* Neither can this Court supply a casus omissus in a treaty, any more than in a law. *We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that our duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.*" *Id.* at 71 (emphasis added).

Warsaw specifically limits "the liability of the carrier" to a specific sum. Article 22. The "carrier" is TWA, but the appellants would add "and its employees", words omitted by the Treaty. *The Amiable Isabella* prohibits the addition of any omitted words and extension of the Treaty beyond "the carrier."

In *Rocca v. Thomson*, 223 U.S. 317, 332 (1912) the Supreme Court stated:

"Treaties are the subject of careful consideration before they are entered into and, are drawn, by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties."

To add to the words used by Warsaw would contravene the Treaty and the view of the High Court.

Numerous cases strictly construe and narrowly apply laws in derogation of common law rights. In *Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959), the Supreme Court decided a case so remarkably similar to the one at bar as to be the equivalent of a case in point.* The Carriage of Goods by Sea Act limited the damages recoverable from the carrier. An agent of the carrier claimed the benefit of the damage limitation. However, the Supreme Court refused to extend the limit to the agent:

"Any such rule of law [shielding an agent from liability for his own negligence], being in derogation of the common law, must be strictly construed, for '[n]o statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express [citation omitted].'" *Id.* at 304-5.

See also *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *Shaw v. Railroad Co.*, 101 U.S. 557 (1879); *Bauers v. Heisel*, 361 F.2d 581 (3d Cir. 1966) (*en banc*), *cert. denied*, 386 U.S. 1021 (1967).

Reasonable and fair interpretation of Warsaw should recognize that it has been severely criticized for the one-sided advantage which the arbitrary damage limit gives to the carrier. Dissatisfaction with Warsaw has been manifested by the United States refusal to ratify the Hague

*The Court below considered the result in *Herd* to be "a highly persuasive analogy opposing the view of the defendants before us" (A 290).

Protocol and by this Court's refusal to apply the damage limit in two cases: *Meriens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965), *cert denied*, 382 U.S. 816 (1965); and *Lisi v. Alitalia Linee Aeree Italiane, S.p.A.*, 370 F.2d 508 (2d Cir. 1966), *aff'd by a divided court*, 390 U.S. 455 (1968). In the latter, this Court articulated the dissatisfaction with Warsaw, 370 F.2d 512-51.

An arbitrary and unjust damage limitation which confers a one-sided advantage to the party who is both culpable and capable of absorbing the loss should not be extended to others.

B. The history of the Warsaw Convention shows it applies to carriers and not their employees.

The Warsaw Convention Treaty was the product of two international conferences. The First Conference on Private Air Law held in Paris in 1925 adopted a resolution to create an International Technical Committee of Aerial Legal Experts (hereafter the C.I.T.E.J.A.),* which was assigned the task of preparing drafts of a multilateral agreement for submission to the Second Conference. After five years of work and eight different texts of draft Conventions, the Second Conference was held in 1929 and resulted in the formulation and signing of the Convention by 23 countries.

The United States did not participate in the work of the C.I.T.E.J.A., had only observers at the 1925 and 1929 Conferences, and did not sign the Convention. The United

* The work of the C.I.T.E.J.A. is discussed in Ide, *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.)*, 3 J. Air Law & Comm. 27 (1932). Mr. Ide was a United States observer at the 1929 Conference.

States, however, subsequently adhered to the Convention as proclaimed by the President in 1934. 49 Stat. 3000, T.S. No. 876.

Significantly, appellants point to nothing in the preliminary drafts, the Minutes of the C.I.T.E.J.A. meetings, or the Minutes of the Warsaw Conference that substantiate appellants' claim that the drafters intended to grant or thought they had granted personal immunity to agents and employees of the carrier. On the other hand, the limited scope of Warsaw was acknowledged at the outset, and the drafters, contrary to appellants' assertion, specifically recognized that the liability of the carrier and the liability of their employees were separate matters.

The work of the C.I.T.E.J.A. was not to end with the Warsaw Convention. The Polish delegate Karol Lutostanski recognized this in assuming the Presidency of the Warsaw Conference in 1929:

"We know that the C.I.T.E.J.A. works on questions of mortgages and other laws regarding real property, on the liability for damages caused to third parties on the ground, on insurance, on general average, on combined carriage, *on the legal status of the captain of the aircraft and of the personnel*, to cite only the most important problems. *We hope that soon the subsequent diplomatic conferences will deal with these questions.* But let's not get ahead of ourselves, let's hold to today's task and concern ourselves with a good beginning." (Emphasis added.)*

* Minutes, Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw (R. Horner & D. Legrez English translation 1975) p. 14 (hereinafter WARSAW MINUTES).

Thus, in the Warsaw Conference that adopted the Convention, its limited scope was recognized, and it was acknowledged that future conferences would deal with issues such as the "legal status of the captain of the aircraft and of the personnel."* It is evident, therefore, that Warsaw drafters and delegates did not equate the liability of the carrier with the liability of employees and agents. Moreover, the Warsaw drafters and delegates did not intend to cover the liability of employees.

The C.I.T.E.J.A. was mainly composed of lawyers from civil law countries. It is a basic civil law principle that a negligent tortfeasor is personally liable for his own acts.** This principle dates back to and stems from the Code Napoleon:

"Art. 1382. Any act by which a person causes damage to another makes the person by whose fault the damage occurred liable to make reparation for such damage.

"Art. 1383. Everyone is liable for the damage he causes not only by his acts, but also by his negligence or imprudence."

The above provisions from the French Civil Code of 1804 (The Code Napoleon) are translated in Von Mehren,

* Even before the 1929 Conference began, four commissions were set up by the C.I.T.E.J.A. at its very first session in 1926; one was given the task of studying *inter alia* the "liability of carrier towards consignors of goods and towards passenger" and another was to study *inter alia* the "legal status of commanding officer and crew." *Idc, supra*, at 32, 33.

** This is also the law in common law countries. See POINT I *supra* as to the law in the United States. An English lawyer was a member of the C.I.T.E.J.A. (*Idc, supra*, at 48) and England, of course, is a common law country.

THE CIVIL LAW SYSTEM, Ch. 7, p. 339 (1957). The same principle appears in German Civil Code, Art. 823, and Italian Civil Code, Art. 2043.

As previously discussed (page 4), a negligent employee is personally liable at common law even though his employer may not be liable. This is also true in some civil law countries. Thus, under Article 831 of the German Civil Code of 1900,* the vicarious liability of an employer for the torts of his employee

"is not absolute. The employer, in some cases, makes out a defense by showing that due care was exercised in the selection of the employee." Von Mehren, THE CIVIL LAW SYSTEM, Ch. 9, p. 434 (1957).

Dr. Otto Riese, a German, was a member of the C.I.T. E.J.A. and was a delegate to the Warsaw and Hague Conferences.** Dr. Riese stated at the Hague Conference (page 22 *infra*) and in his treaties on air law (page 29 *infra*) that Warsaw did not extend the limited liability of the carrier to the carrier's employees or agents.

*"A person who employs another to do any work is bound to compensate for any damage which the other unlawfully causes to a third party in the performance of this work. The duty to compensate does not arise if the employer has exercised ordinary care in the selection of the employee, and where he has to supply appliances or implements or to superintend the work, has also exercised ordinary care as regards such supply or superintendence, or if the damage would have arisen, notwithstanding the exercise of such care." Translation by Von Mehren, THE CIVIL LAW SYSTEM, Ch. 7, p. 342 (1957).

**The latter Conference adopted the Hague Protocol which, although it has not been adopted and has no force in the United States, contains a provision (Article 25A) extending the carrier's limited liability to his employees and agents.

The C.I.T.E.J.A. Reporter was Henry De Vos who was also Belgium's delegate at the Warsaw Conference. In his pre-Warsaw Conference Report submitting the C.I.T.E.J.A. draft text of the Convention, De Vos stated:

"Before examining the articles of the preliminary draft, it is important to bring out that in this matter an international agreement can only be reached if it is limited to certain determined problems. The text applies, therefore, *only to the contract of carriage* in its formal appearances first of all, *and in the legal relationships which arise between the carrier and the persons carried* or the people who ship. *It regulates no other question that transport operations could give rise to*" (emphasis added).
WARSAW MINUTES, p. 246.

Warsaw drafters were renowned legal experts and knew that an employer and an employee were independently liable under the civil and common law systems. Accordingly, if those experts intended to grant limited liability to the employees and agents of a carrier they would have said so. As the Court below so cogently and succinctly put it, "The limitations for agents and employees would have been easy enough to specify" (A 290). Just as they defined "international transportation" in Article 1(2), the drafters could have simply added a definition of "carrier" as inclusive of employees and agents.

The legislative history of the Warsaw Convention in the United States, sparse as it is,* demonstrates this country's belief that Warsaw only regulated the liability of the car-

* The history consists of a report by the then Secretary of State recommending adoption of Warsaw and the President's letter to the Senate forwarding said report and the text of the Convention See 1934 U.S. Avi. Rep. 239-44.

rier. In his Report to the President, Secretary of State Cordell Hull repeatedly referred only to the liability of the carrier. He also recognized the ongoing work of the C.I.T.E.J.A. and the fact that the Warsaw Convention was not intended to deal with all rules relating to international air transportation. 1934 U.S. Avi. Rep. 240-1.

C. The Warsaw Treaty's language shows it applies to limit the liability of carriers only, not their employees.

Warsaw's words are consistent with its history: they were designed to govern only the rights and liabilities of passengers and air carriers, but not others engaged in certain international transportation. There is no evidence the drafters intended the Treaty to go beyond this limited purpose.

The title of the Treaty ("Convention for the Unification of Certain Rules Relating to International Transportation by Air") shows it created *certain rules*, not *all rules* relating to international transportation.

The introductory section of the Treaty states that Warsaw was concluded by

"having recognized the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the *liability of the carrier*" (emphasis added).

This introductory theme—the liability of the carrier—is continued throughout the Treaty. The critical keynote is the carrier-passenger relationship. The passenger's rights against all others, including employees and agents of the carrier, are simply outside the scope of Warsaw.

Chapter III, entitled "Liability of the Carrier," contains the operative sections which impose liability upon and limit the damages recoverable from the carrier. Article 17 provides:

"The carrier shall be liable for damage sustained in the event of death or wounding of a passenger . . . if the accident which caused the damage so sustained took place on board the aircraft . . ." (emphasis added).

There is nothing in any part of Warsaw which imposes liability on an employee or an agent of the carrier or in any way deal with issues of employee liability. The omission of a provision declaring an employee to be liable is critical.

Article 20(1) provides the carrier with an opportunity to escape liability by proving that the carrier and his agents were not at fault:

"(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damages or that it was impossible for him or them to take such measures" (emphasis added).

There is no comparable provision in Warsaw which would enable an agent or employee of the carrier to escape liability by proving he was not at fault. The omission of an escape clause for employees or agents further demonstrates that Warsaw does not govern their liability.

Similarly, Article 21 provides the carrier with the defense of contributory or comparative negligence, but makes no mention of the availability of such a defense to an employee or agent of the carrier:

"If *the carrier* proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate *the carrier* wholly or partly from his liability" (emphasis added).

Article 22 contains the critical damage limitation favoring the carrier, but not anyone else:

"(1) In the transportation of passengers *the liability of the carrier* for each passenger shall be limited to the sum of 125,000 francs" (emphasis added).

At the time Warsaw was promulgated, said damage limitation was approximately \$8,300. Subsequently, as a result of changes in the value of the franc, the damage limitation was increased to \$10,000. Civil Aeronautics Board's Order of January 3, 1974 (Docket No. 26274), Fed. Reg. Vol. 39, No. 7, January 10, 1974. TWA, by signing the Montreal Agreement, with approval of the Civil Aeronautics Board, increased its liability to \$75,000 and waived the Article 20(1) defense of no fault. Order No. E-23680 of May 13, 1966 (Docket No. 17325), Fed. Reg. Doc. 66-5494, May 18, 1966.* Of course, no employee of TWA, including the appellants, ever agreed to any damage limit or to waiver of a defense of no fault.

* This CAB Order recognized that Warsaw governs carriers, not employees of carriers: "[T]he Warsaw Convention, creates a uniform body of law with respect to the rights and responsibilities of passengers, . . . , and air carriers in international air transportation." At the time of this 1966 Order, cases had already held that Warsaw does not apply to the employees and agents of the carrier. See the *Pierre*, *Stratton*, *Hoffman* and *Scarf* cases discussed *infra* at p. 26 *et seq.*

Article 23 declares as void any attempt to relieve the carrier, but not others, of liability or to set a lower damage limit:

"Any provision tending to relieve *the carrier* of liability or to fix a lower limit than that which is laid down in this convention shall be null and void" (emphasis added).

Article 25 grants the passenger the opportunity of recovering *from the carrier* full damages above the limitation by proving wilful misconduct on the part of the carrier or any agent. But Warsaw contains no provision for recovery of full or even limited damages from an agent or employee of the carrier:

"(1) *The carrier* shall not be entitled to avail himself of the provisions of this convention which exclude or limit *his liability* if the damage is caused by *his wilful misconduct*. . . .

"(2) Similarly, *the carrier* shall not be entitled to avail himself of said provisions, if the damage is caused under the same circumstances *by any agent of the carrier acting within the scope of his employment*" (emphasis added).

Of special interest is Article 20(2). It declares that the carrier is not liable for property damage caused by pilot error, provided neither the carrier nor his agents were otherwise at fault. But, of course, Warsaw contains no provision exculpating the pilot from liability for the damage to property he causes.*

* Appellants speculate that the Warsaw drafters and delegates would have disapproved of a provision that would require employees to "dig into their own pocket" (Appellants' Brief, p. 27). They offer no evidence in support of this speculation and Article 20(2) is clear evidence to the contrary. That Article hardly squares with a concern that employees not dig into their own pockets.

"In the transportation of goods and baggage *the carrier* shall not be liable if he proves that the damage was occasioned by an error in *piloting* . . . and that, in all other respects, *he and his agents* have taken all necessary measures to avoid the damage" (emphasis added).

Article 20(1) and (2) and Article 25(2) specifically draw a distinction between the carrier and employees-agents-pilots of the carrier, and show that the liability of the carrier and the liability of employees-agents-pilots is separate and independent.

If the Warsaw drafters intended the word "carrier" to include agents and employees, then "agents" and "piloting" and "agent" and "employment" would not have been used in Articles 20 and 25, respectively, because such words would be redundant. The use of such words show that the distinction between the carrier and its employees was substantive.

Warsaw, of course, does not even govern all passenger-carrier relationships. The Treaty applies to passengers and carriers whose contracts (tickets) provide for international air transportation between countries that are parties to Warsaw. Article 1 provides:

"(1) This Convention shall apply to all international transportation . . . performed by aircraft for hire. . . .

(2) . . . 'international transportation' shall mean any transportation in which, according to *the contract made by the parties*, the place of departure and . . . destination . . . are situated either within the territories of two High Contracting Parties, or within . . . a single High Contracting Party, if there is an agreed stopping place within a territory . . . of another power . . ." (emphasis added).

The appellants were not a party to "the contract made by" the passengers-decedents and the carrier-TWA. Since there was no contract made by the passenger with the appellants-employees, Warsaw does not apply.

While appellants concede that employees are not a party to the contract with the passenger (Appellants' Brief, page 25), they attempt to twist this concession into a wholly unwarranted and speculative explanation for Warsaw's failure to cover employees, *i.e.*, that the Warsaw delegates thought there was no need to consider whether or not to extend the limitation to an employee because he would not be a party to the contract of carriage. Appellants, however, deliberately disregard the legal expertise of the Warsaw drafters and delegates and the fact that delictual or tort liability under the civil law (as well as common law tort liability) was already well developed at the time that Warsaw was drafted and adopted. See Von Mehren, *THE CIVIL LAW SYSTEM*, Chs. 8, 9 (1957). See also Amos & Walton, *INTRODUCTION TO FRENCH LAW*, Chapter X (3d Ed. 1967).

In sum, then, the language of WARSAW establishes the rights and obligations between the carrier and passenger in certain international air transportation. But Warsaw does not govern the liability of an employee or agent employed by such a carrier or limit the damages recoverable by a passenger from such employee or agent. As a result, the appellants' liability is governed by common law principles.

D. Events subsequent to Warsaw, including the unsuccessful attempt to extend Warsaw to airline employees in the Hague Protocol, show Warsaw is limited to "carriers."

Post-Warsaw history also demonstrates that the Treaty's damage limitation does not extend to employees and

agents. That history is, of course, relevant in construing Warsaw. As recently stated by this Court:

"The conduct of the parties subsequent to ratification of a treaty may, thus, be relevant in ascertaining the proper construction to be accorded the treaty's various provisions." *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35 (2d Cir. 1975).

Similarly, in *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 346-47 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968), the Fifth Circuit considered relevant the post-Warsaw sub-committee report presented to the Hague Conference. In *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965), a draft protocol submitted to the Hague Conference was relied upon in holding that military charter flights were subject to Warsaw.*

The Hague Protocol was drafted by the International Conference on Private Air Law which met at the Hague

* While the proposed amendment was rejected at the Hague Conference, an amendment (Article 26) was adopted giving a nation adhering to the Protocol

"the legal power to declare that the [Warsaw] Convention shall not apply to military charter flights on aircraft registered in that country, . . . *The United States has not yet ratified the Hague Protocol* and obviously has not made the requisite declaration under that Protocol. *The unavoidable conclusion is that the Warsaw Convention, as it is presently binding on the United States, is applicable to the flight in this suit.*" *Mertens, supra*, at 854.

So, too, the inescapable conclusion here is that Hague's Article 25A extends protection to employees and agents that is not afforded by Warsaw and, since the United States has not ratified the Hague Protocol, the Warsaw Convention only is applicable.

in 1955. The Hague Conference* was called for the express purpose of revising the Warsaw Convention.

Among the reports submitted to the Conference was the *Report on Revision of the Warsaw Convention*, adopted by the Legal Committee of the International Civil Aviation Organization (hereinafter ICAO) at Rio de Janeiro in September, 1953 and which appears in *Documents of the International Conference on Private Air Law*, 2 ICAO Doc. No. 1686-LC/140 (hereinafter HAGUE DOCUMENTS). Among the Legal Committee's recommendations for changes in Warsaw was the following:

"H. *Liability of Servants or Agents of the Carrier*"

"18. In spite of provisions in the Warsaw Convention limiting the liability of the carrier (except in certain cases), the existing text would not preclude the possibility that efforts might be made by claimants to obtain from the carrier higher damages than those specified in the Convention by filing actions against the servant or agent of the carrier, *upon the basis that no provision existed in the Convention limiting the liability of the servant or agent* and upon the assumption that the carrier would indemnify such servant or agent. In order that the carrier may be protected against this kind of litigation and in order to protect the servants and agents of the carriers, a new provision, Article 25A, . . . has been recommended." HAGUE DOCUMENTS, Section 3, at 99 (A 52).

* A short history of events leading to the Hague Conference appears in the Hague Minutes at XV. Minutes of the International Conference on Private Air Law, ICAO Doc. No. 7686-LC/140 (hereafter HAGUE MINUTES).

The proposed article limiting the liability of agents of an air carrier was debated during the Hague Conferences' 18th, 29th and 30th Meetings. HAGUE MINUTES at 214-23, 351-61 (A 54-74). An examination of these Minutes reveals clearly the opinion of the majority of delegates to the conference that the Warsaw Convention did *not* extend to the agents of an air carrier.

An example of the prevailing opinion on this issue among Conference delegates is the statement of the Belgium Representative:

"Without this article [25A], the servants or agents, and particularly the crew, might be sued in order to pay the whole compensation in respect to the accident, while the operator would have the benefit of the limitation of liability." HAGUE MINUTES at 218 (A 58).

The German delegate to the Hague Conference, Riese, who was also a delegate to Warsaw, observed that:

"[T]he object of Article 25A was only to guarantee the servants or agents a certain measure of protection where those suffering damage brought their actions not against the carrier, but against the servants or agents. Such actions would be in tort, since there would be no contractual relationship between the claimant and the servants or agents. . . ." HAGUE MINUTES at 360 (A 73).

The United States representative to the Hague Conference, G. Nathan Calkins, stated that:

"[N]o case of an action in tort against a servant or agent was governed by the Convention, which related to the liability of the carrier towards passengers and shippers." HAGUE MINUTES at 351 (A 64).

Calkins, in an article discussing the Hague Protocol published a year after the Conference, wrote that:

"In the existing convention, no attempt was made specifically to cover the liability of servants or agents of the carrier for their individual tortious acts." Calkins, *Grand Canyon, Warsaw and the Hague Protocol*, 23 J. Air Law and Comm., 253, 267 (1956).

At the Guadalajara Conference, which was called to extend Warsaw to carriers who are not parties to the contract between the passenger and the contracting carrier,* Professor Riese reiterated his opinion that the Warsaw Convention did not apply to a carrier's employees and agents:

"He considered that, if the carriage was governed by the Hague Protocol, the servants and agents were already protected and could invoke the limits of liability of that Protocol. Consequently, it was not necessary to state this. On the other hand, if the carriage was governed by the Warsaw Convention, the servants and agents could not have the benefit of limits, since the Warsaw Convention did not provide for this." International Conference on Private Air Law, Guadalajara, 134. ICAO Doc. 8301-LC/149-1 (1961) (hereafter GUADALAJARA MINUTES) (A 191).

The Japanese delegate to Guadalajara, a Mr. Nakano, was apparently in agreement with Riese as indicated by

* The Guadalajara Convention (500 U.N.T.S. 31) is also evidence that Warsaw did not intend to cover all rules pertaining to international air transportation or even all rules pertaining to the relationship between carriers and passengers.

his comment with reference to the proposed wording of Article V of the Convention:

"Mr. *Nakano* (Japan) pointed out that the words 'according to the Warsaw Convention, he would not be able to invoke such limits' would not permit the settlement of the situation of the servants and agents since the unamended Warsaw Convention did not contemplate them." GUADALAJARA MINUTES, 197 (A 192).

The Hague Protocol constituted an effort to revise and amend Warsaw, to extend the scope and the protection it gave to the air carriers and to cover areas not covered by Warsaw itself. However, Hague is not the law in the United States.* It was submitted to the Senate but the Senate declined to give its consent. For a history of the United States refusal to ratify the Hague Protocol, see Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 509-16, 532-46 (1967).

* Other International Conventions adopted subsequent to the Warsaw Convention have specifically limited the liability of agents of air carriers. However, the United States has not adhered to or ratified any of the following agreements: Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Done at Rome, on 7 October 1952, 310 U.N.T.S. 181; Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier, Done at Guadalajara on 18 September 1961, 500 U.N.T.S. 31; Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, Done at Guatemala City on 30 September 1971.

As a result of the Senate's refusal to ratify, the Hague Protocol* is a nullity and without any effect in the United States. *Alexandre v. Eastern Airlines, Inc.*, 9 Avi. 17,844 (W.D.N.Y. 1965) (A 75).

Apparently aware that Article 25A of the Hague Protocol and other post-Warsaw air law conventions extending the carrier's limited liability to employees and agents are at complete odds with their position, appellants argue that Hague and said conventions show what the Warsaw drafters would have done if they had been "aware of it" (Appellants' Brief p. 26). Aside from the fact that this is an admission or concession that Warsaw does not extend the carrier's limited liability to his employees and agents, this is not the way in which a Treaty or any other legislation has ever been "construed." By this argument the appellants are asking this Court to rewrite Warsaw, something that this Court cannot do. *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821). This argument also overlooks the stature and legal experience

* Hague adds Article 25A to the Warsaw Convention:

"1. If an action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Article 22.

"2. The aggregate of the amounts recoverable from the carrier, his servants and agents, in that case, shall not exceed the said limits.

"3. The provisions of paragraphs 1 and 2 of this article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result."

of Warsaw's drafters, and the Supreme Court's admonition that treaties

"are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties." *Rocca v. Thomson*, 223 U.S. 317, 332 (1912).

In sum, all efforts to extend Warsaw to employees and agents have been rejected in this country. The only Treaty that remains is Warsaw as originally finalized in 1929, and without any amendment extending it to a carrier's employees or agents.

E. Cases and authoritative writers establish that Warsaw limits the damages of the carrier, but not its employees.

The case of *Pierre v. Eastern Airlines, Inc.*, 152 F. Supp. 486 (D.N.J. 1957) is conceded by the appellants to be precisely in point. In the course of a flight in "international transportation," the plaintiff was injured and sued the airline and its employee pilot (Foxworth). The two defendants asserted the damage limitation of Warsaw and the plaintiff moved to strike the defenses. The Court denied the motion as to the carrier, but granted plaintiff's motion as to the defendant pilot.

"As for the case against the defendant Foxworth the situation is different. The Warsaw Convention at the time of the accident (1953) applied to the carrier only. . . . Therefore the general practice and rules prevalent in the trial of negligence cases, unaffected by the terms of the Warsaw Convention, will control the trial of the plaintiff against the defendant Foxworth." *Id.* at 489.

The *Pierre* Court found support for so holding, as did the Court below, in its examination of the Hague Protocol which was an attempt to amend Warsaw "to include the servants and agents of the carrier in the provision of limitation of liability . . ." *Ibid.*

Pierre was cited with approval and followed in *Stratton v. Trans Canada Airlines*, 27 D.L.R.2d 670 (B.C. Sup. Ct. 1961), *aff'd on other grounds*, 32 D.L.R.2d 736 (B.C. Ct. App. 1962) (A 165-90). In *Stratton*, the plaintiff sued the carrier and the estates of the employees-pilots. The defendants asserted that the Carriage By Air Act, which ratified the Warsaw Convention, applied and limited the liability of a carrier and its employees. The lower court first held that the Act did not apply since the transportation was not "international". He then stated:

"It was submitted that the pilots were covered by the Act. The Act extends to carriers only. There is nothing in the Act that even remotely suggests that the word 'carrier' is to be interpreted as including employees of carriers. *Vide Krawill* Machinery Corp. v. Robt. C. Herd & Co.* [1959] 1 Lloyd's Rep. 305; *Pierre v. Eastern Airlines, Inc.* (1957) U.S.& Can. Av. R. 431." *Id.* at 674.

The Court of Appeals affirmed the holding that the flight was not "international" and concluded that "it is not necessary to consider whether the pilots would have been entitled to its benefits had it been applicable to the flight in question." *Id.* at 749.

* The case cited as *Vide Krawill* etc. is *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959), the same case regarded by the Court below as providing "a highly persuasive analogy opposing the view of the defendants before us" (A 290).

In *Scarf v. Trans World Airlines, Inc. and Allied Aviation Service Corp.*, 4 Avi. 17,795 (S.D.N.Y. 1955) (A 35-6), a plaintiff injured when a loading ramp moved as he was boarding the plane sued TWA and Allied Aviation. Allied was alleged to be negligent in failing to properly affix the platform. The claim against TWA was dismissed for lack of venue under Article 28 of Warsaw.

Following dismissal of the complaint against TWA in the first *Scarf* opinion, defendant Allied moved to dismiss the complaint against it on the theory that the dismissal of the claim against TWA for lack of venue under the Warsaw Convention required a similar dismissal for its agent. In *Scarf* v. Trans World Airlines, Inc.*, 4 Avi. 17,828 (S.D.N.Y. 1955) (A 37), the Court denied Allied's motion and held:

"The Complaint clearly alleges a separate claim for negligence against Allied Aviation Service Corporation. Whether the failure to affix the landing ramp . . . be considered malfeasance or non-feasance, a claim good in law is stated in the complaint against the service corporation. *Restatement of the Law of Agency*, §354 (a), (c) and (d); C.J.S., *Agency*, §§220 through 223. The tort sued on is not the carrier's tort." *Id.* at 17,829.

Similarly, the plaintiffs in this case base their claim not on "the carrier's tort" but on the tort of the individual defendants-appellants.

A number of respected air law authorities agree that the Warsaw Convention applies only to the air carrier and not to its employees or agents. Dr. Otto Riese, a

* *Accord, Hoffman v. British Overseas Airways Corp.*, 9 Avi. 17,180 (N.Y. Sup. Ct. 1964) (A 38).

delegate to both the Warsaw and Hague Conferences and also a member of the C.I.T.E.J.A., states the following in his treatise on air law:

"In our opinion, there is no doubt that the Convention governs only the liability of the air carrier; this is clearly evident not from the title, but from the preamble and from the text of the liability regulations (Article 17 *et seq.*). Accordingly, one would arrive at the conclusion that the liability of persons other than the air carrier provided by national law is not affected by the Convention, and consequently is in force alongside the Convention. Accordingly, this would apply in particular in the following two cases:

1. *The personnel of the air carrier, in particular, the pilot, could be sued by the injured parties on the basis of a liability in tort provided by the applicable national law. . . .*" Riese, *LUFTRECHT*, 431 (1949) (emphasis added) (A 41-42).

Other commentators have expressed similar opinions based upon a thorough examination of the Warsaw Treaty and its history.

"Both the previous history and the preamble of the Warsaw Convention shows that the intention was to regularize the liability of the carrier; there is nothing to indicate that the rules were also intended to apply to the carrier's servants." M. Kamminga, *THE AIRCRAFT COMMANDER IN COMMERCIAL AIR TRANSPORTATION*, 91 (1953).

See also Pratt, *Carriage By Air Act, 1952—Limitation of Air Carrier's Liability—Whether Servants of Carrier Also Protected*, 41 Can. B. Rev. 124, 128 (1963).

Two of the cases relied on by the appellants as being to the contrary are: *Wanderer v. Sabena*, 1949 U.S. Avi. Rep. 25 (N.Y. Sup. Ct. 1949) and *Chutter v. KLM*, 132 F.Supp. 611 (S.D.N.Y. 1955). Calkins, who represented the United States at the Hague Conference, has stated categorically that both *Chutter* and *Wanderer* are "clearly wrong." Calkins, *Grand Canyon, Warsaw and The Hague Protocol*, 23 J. Air Law & Comm. 253, 267 (1956).

Wanderer was decided by a trial court in a brief two-sentence opinion without any analysis or attempt to support the conclusion. In *Chutter*, the Warsaw's Convention two-year statute of limitation was applied to dismiss the complaint against a loading ramp service corporation by drawing an analogy between the Warsaw Convention and the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §1300 *et seq.* in two Circuit Court decisions: *A. M. Collins and Co. v. Panama R. Co.*, 197 F.2d 893 (5th Cir. 1952), and *United States v. The South Star*, 210 F.2d 44 (2d Cir. 1954). Said decisions held that the COGSA limitation of liability provisions applied to independent stevedoring concerns.

The United States Supreme Court has, however, rejected the reasoning of both *Collins* and the *South Star* and specifically overruled *Collins* in the case of *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959). In *Herd*, the Supreme Court found that earlier international conventions on which the COGSA was based did not intend to insulate the carrier's agent from liability and no such intent was shown by the legislative history of the COGSA. The Court, in overruling *Collins*, stated:

"[W]ithdrawal of the right to sue the agent for his torts would result at times in a substantial dilution of the rights of claimants', and that withdraw-

al of that right would be 'such a basic change in one of the fundamentals of the law of agency [as] should hardly be left to conjecture.'" *Id.* at 304.

Thus, the rationale and the authority on which *Chutter* relied was specifically rejected by the Supreme Court.

The Supreme Court's reason for refusing in the *Herd* case to insulate stevedores from liability applies in this case. To insulate the carrier's employees from responsibility for their negligence would constitute a "substantial dilution of the rights of claimants." *Ibid.* It was not the intent of the drafters of the Warsaw Convention or of the Senate when it adhered to the Convention to foreclose the common law right of a passenger to proceed directly in tort against an agent or servant of an air carrier.

In an effort to bolster their argument that the carrier and its employees are synonymous, appellants cite part of a sentence from Justice Steuer's Charge in *Froman v. Pan American Airways, Inc.*, 1953 U.S. & Can. Avi. 1, 5 (N.Y. Sup. Ct. 1953). The entire quote reads:

"Above that point the situation is made just the reverse, and the law provides that if he wishes to recover above the limit that is fixed in the statute he must establish that the accident came about as a result of the wilful misconduct of the defendant, and included in the definition of the defendant is that of any officer or employee of the defendant."

It is clear that Justice Steuer was not equating the carrier and its employees for the purpose of the damage limitation as appellants suggest. On the contrary, he was instructing the jury that the employee's conduct should be charged to the carrier for the purpose of determining if the carrier is guilty of wilful misconduct. The charge only deals with the carrier's responsibility. The crew was

not sued. Similarly, appellants' reliance on *Schloss v. Matteucci*, 260 F.2d 16 (10th Cir. 1961) is misplaced. *Schloss* involved an interpretation of a New Mexico statute which established a damage limitation of \$10,000 whenever a person died due to the negligence of the carrier. The state damage limitation has been repealed and *Schloss* has never been cited or followed, except in one other case arising out of the same accident. *Campbell v. Matteucci*, 261 F.2d 225 (10th Cir. 1963).

Appellants' main supporting authority is Drion (Appellants' Brief, page 21), who opines that Warsaw's Article 24* can serve as a predicate for extending the carrier's liability limitation to servants and agents. Drion was neither a member of the C.I.T.E.J.A. nor a delegate to the Warsaw Conference. Drion was legal counsel to KLM and can hardly be considered an impartial interpreter of the Convention. Moreover, Article 24 is not susceptible to the interpretation urged by Drion. The phrase "however founded" therein is clearly a reference to tort or contract actions, *i.e.*, Warsaw applies whether the action is predicated on tort or contract. Article 24 does not say that Warsaw applies to any action or damages "whoever founded against," but this is the strained and wholly unjustified construction that Drion and presumably the appellants would have this Court place on Article 24. To extend Article 24 and, indeed, any language in Warsaw, beyond the carrier to his employees and agents would be to rewrite the Treaty, not to construe it.

In urging this Court to extend Warsaw by filling in what the drafters omitted, the appellants conveniently ignore the long-established principles of construction that Courts

* "[A]ny action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention."

should not "sanction a deviation from the clear import of a solemn treaty," *Maximov v. United States*, 373 U.S. 49, 54 (1963); that they should not "alter, amend or add to any treaty by inserting any clause, whether small or great . . .", *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821); and that treaties in derogation of the common law must be strictly construed and given no greater scope than the words required. To accept appellants' claim would require this Court to reject these long-established principles.

POINT III

Other arguments advanced by appellants for reversal lack merit.

Appellants argue that a corporate air carrier can only act through its officers and employees and then draw the wholly illogical conclusion that if the carrier's liability is limited the employee's liability must also be limited. This argument begs the question. In addition, the argument is premised on the false assumption that Warsaw only applies to *corporate* air carriers. Drion, upon whom appellants place great weight, states that Warsaw applied "not only to commercial aviation, but also to private flyers" so long as the carriage is performed for remuneration. Drion, *LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW*, §3, p. 3 (1954). Even appellants admit, albeit reluctantly, that a recent Civil Aeronautics Board service list, which does not purport to be and is not a list of all Warsaw carriers, included two non-corporate carriers (A 219).

Furthermore, appellants' argument seeks to equate an employer's liability with that of his employees. But, as previously discussed, to do so would be contrary to the

common or civil law. Although an employer's liability in tort is vicarious and derivative by *respondeat superior*, the liability of the employee is personal and direct.

Appellants imply that the Warsaw drafters must have intended the protection of employees and agents because many air carriers have insurance which covers employees or have agreements to indemnify their employees. This not only ignores the plain meaning of the language of Warsaw and its history, but appellants' premise that employee insurance coverage or indemnification agreements existed in 1929 is not supported. In fact, the contrary was true. Pilots insisted on such indemnification agreements and sought to have Warsaw amended to extend Article 22 to employees for the precise reason that they were not generally insured or indemnified.

The dire consequences predicted by the appellants on pages 7 and 8 of their Brief, some of which go beyond the record, should give the Court little pause. Lack of uniformity is built into Warsaw by provisions which refer courts to national law (*e.g.* Articles 21, 24(2), 25(1) and 29(2)) and Warsaw has not been uniformly applied even within this country. Cf. *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385 (1974), with *Husserl v. Swiss Air Transport Company, Ltd.*, 388 F.Supp. 1238 (S.D.N.Y. 1975). As for the diplomatic problems that might be encountered, they can be easily overcome. Warsaw is not vital to our foreign policy, and we enjoy an amicable relationship with the countries that have adopted air law conventions that this country has refused to ratify—The Hague and Guatemala City Protocols and the Rome and Guadalajara Conventions. The technical details covering the form of ticketing and air way bill can easily be handled by informal agreement.

In arguing for reversal on the ground that Warsaw will be avoided by suits against employees, what the ap-

pellants are really asking this Court to do is relieve *carriers* of their contractual obligations to their employees to provide indemnification and to judicially enact the Hague Protocol. To do so would contravene the High Court's prohibition and would also nullify the Senate's refusal to give its advise and consent to the Hague Protocol.

Appellants' concern for those employees who may be exposed to judgments is admirable. But most carriers do provide indemnity protection for employees. And the inability of an employee or any other tortfeasor to satisfy a judgment has never been a basis to deny finding them liable.

Point II of Appellants' Brief is devoted to the theme that the Executive Branch has declared via Warsaw a national policy favoring limited carrier liability, and this Court is powerless to declare otherwise. The short answers to this assertion is that such a policy never existed, the carrier's liability is not at issue here and Warsaw's language and history shows it does not apply to the appellants-employees.

Even if such a national policy existed when Warsaw was adopted by the United States over 40 years ago, the policy was then to protect an industry in its infancy. That "infant" is now a billion dollar industry and is no longer in need of special protection. No just reason exists today for extending the arbitrary and inadequate damage limitation beyond the four corners of the Treaty and thus shifting losses to passengers.

United States public policy strongly disapproves of any limitation of damages arising from personal injury or death or attempts by carriers to stipulate against liability for negligence. *United States v. Atlantic Mutual Insurance Co.*, 343 U.S. 236, 239, 242 (1952); *New York Central Ry. Co. v. Lockwood*, 84 U.S. (17 Wall.) 357 (1873). Cf.

Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 211 N.Y.S.2d 133 (1961); *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir. 1973), *cert. denied*, 414 U.S. 856 (1973); N.Y. Constitution, Art. 1, §16. Thus, rather than reflecting American public policy, the Warsaw Convention is a deviation from it.

The Senate's adherence to Warsaw was not a policy decision. A brief letter of transmittal from the United States Secretary of State to the President was, in turn, transmitted to the United States Senate. See 1934 U.S. Avi. Rep. 239-44. This was done five years after the Warsaw Conference. The United States neither signed the Warsaw Convention nor participated in its drafting. Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 502 (1967) (hereinafter Lowenfeld & Mendelsohn). The United States Senate, in a voice vote, gave its advice and consent to United States adherence to the Warsaw Convention in 1934 without debate, without any committee hearing and without any committee report. 78 Cong. Rec. 11,582 (1934). This prompted a United States Senator to conclude more than twenty years later that "the Senate acted in 1934 in the most routine fashion on a matter deemed to be of no particular importance." 111 Cong. Rec. 17,882 (1965).

If post-War history illustrates any policy, it is that the Warsaw regime is inadequate, its damage limitation is unconscionably low and that its provisions are contrary to American principles. Within a year of the United States adherence, debates began over the Convention's revision. Lowenfeld & Mendelsohn, *supra*, at 502. The first major correction effort was the 1955 Hague Protocol, in which Warsaw's damage limitation would be doubled to \$16,600.

The Congressional sentiment opposing both the inadequate limitation and limited carrier liability was so clear that the Administration arranged to have the Hague vote

postponed while it tried to devise a voluntary payment scheme. Lowenfeld & Mendelsohn, *supra*, at 546-52. When all efforts failed the Administration finally did what Congress had been urging—it filed a formal denunciation of Warsaw with the withdrawal to become effective on May 15, 1966.

During the week before the withdrawal became effective, the international airlines proposed a deal called the Montreal Agreement. They would waive liability up to \$75,000 if the Administration would agree to withdraw its denunciation of Warsaw. Despite the protest of twenty-nine Senators who called for public hearings on the subject, the Administration unilaterally agreed to accept the airlines' proposal. Lowenfeld & Mendelsohn, *supra*, at 594, 596. Thus, the Montreal Agreement "came about almost overnight and without normal constitutional and legislative processes." Lowenfeld & Mendelsohn, *supra*, at 601-602.

The Administration recognized that the new limitation was unacceptable to the American public and began efforts to revise Warsaw and increase the damage limitation. The 1971 Guatemala Protocol is the latest effort to shore up Warsaw. Like Hague, it has not been ratified by the Senate and is irrelevant to the issue before this Court.

Warsaw does not represent American policy and, indeed, is contrary to the long standing policy against providing limitations of liability for damages caused by negligence. The Executive Branch, moreover, makes *foreign*, not public policy, and Treaties constitutionally require the advice and consent of the Senate. It has never approved any amendment of Warsaw and rejected Hague.

Appellants ask this Court to extend an unjust damage limitation beyond the language and intent of The Treaty

solely to protect employees from the consequences of their negligence. They would deny passengers and their estates full, fair, just and adequate recovery for damage sustained. They would do all of this despite a policy opposing limitation and in violation of the language of the Convention and the intent of the draftsmen.

CONCLUSION

The decision-order below granting plaintiffs-appellees' motion to strike defendants-appellants' Second Affirmative Defense of the Warsaw Convention, as supplemented by the Montreal Agreement, should be affirmed in all respects.

Respectfully submitted,

KREINDLER & KREINDLER
Attorneys for Plaintiffs-Appellees
Office and P.O. Address
99 Park Avenue
New York, New York 10016
(212) 687-8181

of Counsel:

LEE S. KREINDLER
MILTON G. SINCOFF
STANLEY J. LEVY
MELVIN I. FRIEDMAN
JAMES D. VEACH

U.S COURT OF APPEALS FOR THE SECOND CIRCUIT

REED

VS

WISER

AFFIDAVIT
OF SERVICE

STATE OF NEW YORK,

COUNTY OF NY, ss:

being duly sworn,

deposes and says that **BERNARD S. GREENBERG** he is over the age of 21 years and resides at 162 E. 7th, NY, NY

That on the 30th day of september, 1976 19 at

he served the annexed appellee's brief upon
Bingham Englar Jones & Parisi, 99 John Street, NY, NY
in this action, by delivering to and leaving with said attorneys
two true cop thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the
person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 30th
day of september, 1976 19 }

Bernard S. Greenberg

Roland W. Johnson
ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509105
Qualified in Delaware County
Commission Expires March 30, 1977